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<b>T.S., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 19-1895</b>
	)	<b>Issued: September 22, 2020</b>
<b>U.S. POSTAL SERVICE, MAIN POST OFFICE,</b>	)	
<b>Greenville, SC, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

<sup>2</sup> The Board notes that following the September 4, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

period February 3 through March 2, 2019; and (2) whether appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On July 28, 2016 appellant, then a 44-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging a right shoulder injury on June 20, 2016 due to handling a hose while in the performance of duty. OWCP accepted her claim for strain of the muscles/tendons of the right rotator cuff. Appellant stopped work on June 23, 2017 and OWCP paid her wage-loss compensation on the supplemental rolls for disability from work.

In a July 16, 2018 report, Dr. Todd C. Swathwood, a Board-certified orthopedic surgeon, reported the findings of his physical examination and concluded that appellant had 10 percent permanent impairment of her right upper extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>3</sup>

On July 23, 2018 appellant filed a claim for a schedule award (Form CA-7) due to her accepted employment injury.

On October 29, 2018 OWCP referred appellant's case along with a statement of accepted facts to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for evaluation of her right upper extremity permanent impairment. On October 31, 2018 the DMA reviewed Dr. Swathwood's findings and concurred with the determination that appellant had 10 percent permanent impairment of her right upper extremity under the sixth edition of A.M.A., *Guides*.

By decision dated November 29, 2018, OWCP granted appellant a schedule award for 10 percent permanent impairment of her right upper extremity. The award ran for 31.2 weeks from July 21, 2018 through February 24, 2019. OWCP paid appellant schedule award compensation based on her pay rate of \$674.12 per week.

Appellant received five compensation payments covering the period of the schedule award (July 21, 2018 through February 24, 2019) which were directly deposited into her bank account. The amounts, deposit dates, and covered periods of payment were as follows: \$8,161.67 on December 7, 2018 (covering the period July 21 through November 10, 2018); \$2,022.36 on December 8, 2018 (November 11 through December 8, 2018); \$2,022.36 on January 5, 2019 (December 9, 2018 through January 5, 2019); \$2,022.36 on February 2, 2019 (January 6 through February 2, 2019); and \$1,579.75 on March 1, 2019 (February 3 through 24, 2019). On March 2, 2018 appellant also received a sixth purported schedule award payment in the amount of \$2,025.55 which was identified as covering the period February 3 through March 2, 2019, a period which overlapped and extended beyond the period of the fifth payment.

The case record contains a manual adjustment form completed on March 28, 2019 in which an OWCP claims examiner calculated that appellant received a \$2,025.55 overpayment.

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

In a March 28, 2019 notice, OWCP advised appellant of its preliminary determination that she received a \$2,025.55 overpayment of compensation due to her receipt of schedule award compensation to which she was not entitled. It also made a preliminary determination that she was at fault in the creation of the overpayment. OWCP advised appellant that she could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. It informed her that she could submit additional evidence in writing or at a prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return a financial information questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of the overpayment.

On April 2, 2019 appellant requested reconsideration of the November 29, 2018 schedule award decision, noting that she was only challenging the amount of the overpayment. She maintained that OWCP should have based its schedule award payment calculations on a pay rate of \$678.00 per week, rather than \$674.12.

On April 22, 2019 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review, noting that she disagreed that an overpayment occurred.<sup>4</sup> She submitted a Form OWCP-20 completed on April 22, 2019 in which she listed \$5,400.00 in monthly income, \$3,541.00 in monthly expenses, and \$10,000.00 in assets. Appellant did not provide documentation for all of her monthly expenses.

By decision dated July 3, 2019, OWCP denied modification of its November 29, 2018 decision, finding that it had properly calculated appellant's schedule award payments based on the proper pay rate.

During the July 29, 2019 prerecoupment hearing, appellant indicated that she did not receive her first schedule award payment until months after the July 21, 2018 start date of the schedule award. She asserted that she was confused about the last two schedule award payments received in March 2019 and thought she was entitled to receive both of them given that the schedule award payments "didn't start on time." Appellant again maintained that the amount of the \$2,025.55 overpayment was incorrect because she should have received \$2,269.00 for each month that her schedule award ran, rather than \$2,022.36.<sup>5</sup>

By decision dated September 4, 2019, OWCP's hearing representative finalized the preliminary determination that appellant received a \$2,025.55 overpayment of compensation. The hearing representative also finalized the preliminary determination that appellant was at fault in the creation of the overpayment, finding that she should have known that she could not have received schedule award compensation that covered a period after the February 24, 2019 expiration of the award. It was determined that, therefore, waiver of recovery of the overpayment was

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<sup>4</sup> In an April 22, 2019 letter, appellant asserted that the amount of the \$2,025.55 overpayment was incorrect because she should have received \$2,269.00 for each month that her schedule award ran, rather than \$2,022.36.

<sup>5</sup> During the hearing, appellant further discussed her financial circumstances. After the hearing, she submitted additional financial documentation.

precluded. The hearing representative discussed appellant's financial information and required repayment of the overpayment through payments of \$200.00 every 28 days.<sup>6</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>7</sup> When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled."<sup>8</sup>

OWCP's procedures provide that an overpayment is created when a schedule award expires, but compensation continues to be paid.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$2,025.55 because she received an improper payment of compensation benefits for the period February 3 through March 2, 2019.

The record reflects that appellant properly received schedule award payments for the period July 21, 2018 to February 24, 2019 pursuant to OWCP's November 29, 2018 schedule award decision. However on March 2, 2019 appellant received an improper payment in the amount of \$2,025.55, purportedly for the period February 3 through March 2, 2019.<sup>10</sup> The Board finds that she was not entitled to this \$2,025.55 payment as she had already been fully compensated for the schedule award.<sup>11</sup> The record thus establishes that appellant received an overpayment of compensation in the amount of \$2,025.55.

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<sup>6</sup> With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *A.B.*, Docket No. 18-0915 (issued October 24, 2018); *Miguel A. Muniz*, 54 ECAB 217 (2002). As appellant was not in receipt of continuing compensation at the time of OWCP's September 4, 2019 overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case. See *Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

<sup>7</sup> 5 U.S.C. § 8102(a).

<sup>8</sup> *Id.* at § 8129(a).

<sup>9</sup> *C.P.*, Docket No. 19-1985 (issued July 1, 2020); *R.J.*, Docket No. 17-1974 (issued March 23, 2018); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.2f(1)(I) (September 2018).

<sup>10</sup> The March 2, 2019 payment duplicated a March 1, 2019 payment covering a period for which appellant received appropriate schedule award compensation (February 3 through 24, 2019) and then extended beyond the expiration of the schedule award on February 24, 2019.

<sup>11</sup> See *M.J.*, Docket No. 19-1665 (issued July 29, 2020). Appellant argued that the amount of the \$2,025.55 overpayment was incorrect because she should have received \$2,269.00 for each month that her schedule award ran, rather than \$2,022.36. However, she did not provide adequate support for this argument.

## **LEGAL PRECEDENT -- ISSUE 2**

5 U.S.C. § 8129(b) provides: “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”<sup>12</sup> A claimant who is at fault in the creation of the overpayment is not entitled to waiver.<sup>13</sup> On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual will be found at fault if he or she has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.<sup>14</sup>

Section 10.433(b) of OWCP’s regulations provides that whether or not an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.<sup>15</sup>

## **ANALYSIS -- ISSUE 2**

The Board finds that OWCP improperly found that appellant was at fault in the creation of the overpayment.

In cases where a claimant receives compensation through direct deposit, the Board has held that OWCP must establish that, at the time a claimant received the direct deposit in question, he or she should have known that the payment was incorrect.<sup>16</sup> The Board has held that an employee who receives payments from OWCP in the form of a direct deposit is not at fault for the first incorrect deposit into his or her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.<sup>17</sup> Because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.<sup>18</sup> Whether or not OWCP determines that an individual is at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.<sup>19</sup>

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<sup>12</sup> 5 U.S.C. § 8129(b).

<sup>13</sup> See *K.P.*, Docket No. 19-1151 (issued March 18, 2020); *R.G.*, Docket No. 18-1251 (issued November 26, 2019); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

<sup>14</sup> 20 C.F.R. § 10.433(a).

<sup>15</sup> *Id.* at § 10.433(b); see also *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

<sup>16</sup> *T.N.*, Docket No. 17-0387 (issued November 28, 2018); *J.K.*, Docket No. 08-1761 (issued January 8, 2009); *Joan Ross*, 57 ECAB 694 (2006); *Desiderio Martinez*, 55 ECAB 245 (2004).

<sup>17</sup> *Id.*; *Tammy Craven*, 57 ECAB 589 (2006).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

The Board finds that the evidence of record establishes that on the date of the first direct deposit of compensation following the termination of her schedule award compensation appellant did not know or would have had reason to know that she was accepting a direct deposit to which she was not entitled. The record does not contain documentation or other evidence to demonstrate that she had knowledge at the time of the March 2, 2019 direct deposit in the amount of \$2,025.55 that the payment was incorrect. Therefore, when the improper direct deposit was made, appellant had no knowledge that it was incorrect. Appellant, therefore, cannot be found to be at fault in the acceptance of the March 2, 2019 direct deposit.<sup>20</sup> The case must therefore be remanded to OWCP for a *de novo* decision to determine whether she is entitled to waiver of recovery of the overpayment in the amount of \$2,025.55.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$2,025.55 because she received an improper payment of compensation for the period February 3 through March 2, 2019. The Board further finds that OWCP improperly found that she was at fault in the creation of the overpayment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 4, 2019 decision is affirmed in part and reversed in part. The case is remanded for further action consistent with this decision of the Board.

Issued: September 22, 2020  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>20</sup> See *M.J.*, *supra* note 11.